

December 7, 2015

Mr. Ben Grumbles
Secretary
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, MD 21230

Dear Secretary Grumbles:

Thank you for your letter of November 24th regarding our Fairfield Renewable Energy Project (the "Fairfield Project") and expressing concern that the Fairfield Project has not satisfied the Certificate of Public Convenience and Necessity ("CPCN") requirements for continuous construction or completion within a reasonable time¹. We appreciate your interest in the Project and the schedule for ongoing construction activities. As your letter notes, these requirements are not black and white, and I believe that a reasonable interpretation leads to the conclusion that the Fairfield Project is in compliance with the CPCN.

The communities of Brooklyn and Curtis Bay have thoroughly evaluated the Fairfield Project and as you know we have their full support as documented by the Memorandum of Understanding signed several years ago. Not only will the Fairfield Project significantly improve air and water quality, land use and conservation of resources, but it will provide long term permanent jobs and business and community development opportunities not otherwise available.

As detailed below;

- (1) the stop-work order consumed almost eight full months between November 1, 2013 and the present, meaning an 18-month period of inactivity would run until January 2, 2016;
- (2) within the last two years Energy Answers has engaged in continuous construction activity not prevented by the stop work order but satisfying the Clean Air Act Standards; and
- (3) additional construction work is planned before the end of 2015.

1) The MDE stop-work order period alone means the 18-month period extends into January 2016.

Your letter indicates that November 3, 2015 is "... the last possible date by which a delay in any construction activity can be supported...." However, the Department's letter implementing the

¹ I interpret the Department's letter as primarily focusing on the 18 month period rather than on completion timing given that this type of facility involves a comparatively lengthy construction period even without delays.

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stop work order was dated June 19, 2014 (See attached). The subsequent letter lifting the stop work order was received by Energy Answers on February 11, 2015, which represents an almost eight month prohibition on construction activity for the power plant itself. Therefore, fully crediting this period when Energy Answers could not perform work under the permit while it was actively working with the Department to resolve the complaint should mean the 18-month period runs until January 3, 2016.

2) Continuous construction program

As your letter notes, there is no precise statutory or regulatory definition regarding the nature and extent of construction required to satisfy the requirement that construction not cease for more than 18 months. This necessitates a case-by-case analysis by the regulator to determine whether, considering all relevant facts and circumstances, the intent of the Clean Air Act has been satisfied.

COMAR 26.11.02.04B, as incorporated into the Project's CPCN as Condition A-6, provides that the Project's PSD permit expires if: (1) construction is substantially discontinued for a period of 18 months or more after it has commenced, or (2) construction is not completed within a reasonable period of time after issuance of a final CPCN. EPA has issued guidance interpreting on-site construction as meaning "placement, assembly, or installation of materials, equipment, or facilities which will make up part of the ultimate structure of the source." "Commence Construction" under PSD, United States Environmental Protection Agency, 2 (July 1, 2017). Along these lines, "[p]lacement of footings, pilings, and other materials needed to support the ultimate structures clearly constitute on-site construction." *Id.* These activities "must take place on-site or must be site specific." *Id.* Site clearing and excavation activities, such as the digging of the hole, do not satisfy this requirement. *Id.*; see also *Sierra Club v. Franklin County Power of Illinois*, 546 F.3d 918, 931 (7th Cir. 2008) (adopting EPA's guidance and finding that digging a hole constitutes an excavation activity).

In the absence of actual "placement, assembly, or installation of materials, equipment, or facilities which will make up part of the ultimate structure of the source," construction can be established through "clear evidence (through contracts or otherwise) that construction of the entire facility will definitely go forward in a continuous manner." *Id.* EPA has found that "contracts for work on footings, pilings, and other site specific materials will clearly satisfy [this] requirement, while contracts for clearing and excavation will not." *Id.* Contracts for non site-specific equipment, such as boilers, will not satisfy this requirement. *Id.* A PSD permit holder has thus not "substantially discontinued construction" if it has satisfied this definition of "on-site construction" during the 18-month period. COMAR 26.11.02.04B(2).

Since construction began in August 2013, numerous construction activities have occurred on the site that satisfy the Clean Air Act requirements set forth above. Please remember that the value of reusing an otherwise unusable industrial site requires addressing many issues not found on a "greenfield site". Solving infrastructure and contamination issues and designing

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construction solutions is an essential part of doing that right. The following list of specific activities has been performed to prepare the site for future long-term use - work that would otherwise not be done were it not for the construction of the Project.

- **Storm Water Handling Improvements:**

- During heavy, 24 hour precipitation storm events, part of the site along the east-west line adjacent to the Power Plant footprint experiences flooding. Upgrades to the installed infrastructure are being implemented to facilitate better management of these events.

During the summer of 2013, a specialty contractor was brought in to inspect and evaluate the current conditions of the storm water holding tanks T-2501, T-2502, T-4301 and T-4302, and their ability to support long-term site use. The associated storm water piping, pumps, instrumentation, electrical components and structural supports were also evaluated. Much of the fiberglass piping was weathered and cracked, the electrical and instrumentation aged and in need of upgrades, and many of the structural supports had rusted, failed or been damaged.

The upgrades and modifications involve:

- T-2501 was not economically repairable and will be decommissioned and removed from the site.
- T-2502 and T-4301 will be repaired and remain in-service.
- The existing lift pump will be replaced and piping changed to increase the pumping capacity of the system to avoid flooding and ponding.
- Controls will be upgraded.

- Design work started: Fall 2013
- Field work started: Sept 14, 2015

- **Impoundment Area Improvements:**

- To improve worker safety and suitability for redevelopment, a French drain system was installed around the impoundment area. This eliminated sub-surface rainwater runoff on adjacent site roads.
- Design work started: Winter 2014
- Field work started: March 2015 and completed April 2015 (2nd week)

- **Electrical reliability:**

- To improve electrical reliability to the site, BGE re-fed the site directly from the Patapsco Ave aerial 13.2 KV feeders. The electrical substation was deactivated

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and removed.

- Design work started: June 2015
 - Field work started: mid July 2015 and completed mid August 2015
- North Parcel prep work to prepare for upcoming crushing operations and interim occupancy by a 3rd party tenant:
 - To enhance the ability to develop the North Parcel, legacy contamination issues needed to be addressed. The proposed plan is to excavate the source contamination along the road leading to the former Bldg 91 process structure – approximately 300 tons. This area is north of the rail siding on the North Parcel. This soil would be treated on site or disposed of off-site as required.
 - This area would be capped as laid out in the Corrective Measures Study/Implementation Plan.
 - Overgrown vegetation has been mowed and cleared to allow for grading and former foundations to be removed
 - The rail spur from the cross-property rail lines on the North Parcel has been removed.
 - Historical groundwater sampling results for the portion of the North Parcel south of the rail siding shows no legacy issues pertaining to the potential for vapor risks. The USEPA requested, in a letter dated November 19, 2015, that empirical data be collected to confirm this. A work plan is currently being developed for USEPA approval. This sampling will likely be conducted in Q1 2016. Based on those testing results, a request can be submitted to USEPA to reclassify the area as non-restricted, which will allow more economical redevelopment.
 - The entire parcel will be graded with storm water management features incorporated. Paving, fencing and lighting will be installed for safe interim use of the parcel and longer term use for equipment lay down and ultimate development of the eco-industrial park. We have received a letter of intent from a prospective tenant.
 - Design work started: May 1, 2015
 - Field work started: August 2015
- Warehouse Evaluation and upgrade
 - To determine the work necessary to upgrade the warehouse to a safe, usable condition and determine whether it could be used for Project purposes. The following work has been done:
 - In March of 2015, an engineering evaluation was done to determine what services would be needed to reoccupy the warehouse now that essential services to this site have been cut. Those services included, water, firewater, electricity, sanitary and alternate fuel supply to a small

- packaged boiler for steam.
 - Soil gas and wipe samples were taken to establish the requirements for the occupancy of the existing warehouse for reuse. Sampling was done in: 2nd week of September 2015.
 - The results of the soil gas survey were summarized in the *Subslab Soil Gas Sampling in the Warehouse* Report and submitted to the USEPA on December 3, 2015.
- Repair and replacement of Patapsco Ave rail crossing
 - The existing rail crossing at Patapsco Avenue has failed and traffic is forced to dodge large potholes in the crossing. It was deemed necessary to try to repair this crossing before the end of the year.
 - Materials have been received on-site to replace the railroad ties and replace the rubber rail crossing.
 - Permitting started: November 6, 2015
 - Field work is scheduled for December 14, 2015

Taken together, these activities rise above mere excavation and site clearing, and represent necessary, on-site work and actual construction satisfying the Clean Air Act construction requirements detailed above. Thus, irrespective of the work stop period, Energy Answers is in compliance with its CPCN.

3) Additional planned construction

The timeline above accommodates our year-end target of further continuing construction activity sufficient to maintain compliance with the permit, specifically the impending concrete rubble "crushing" work intended to recover the material for re-use as structural backfill in the Project's construction plan and also the following activities currently underway:

- Pulling up stumps from the removed trees
- Pulling up the defunct railroad siding that used to serve the old unloading station
- Pulling up pipe bollards, and later cutting off hydrants and post indicating valves
- Filling abandoned pipes that have the potential of causing sink holes, and filling the existing sink holes

The additional planned work in advance of the "crushing" scheduled for December includes:

- Demolishing the above ground concrete piers, slabs and foundations to be incorporated into the existing rubble piles.

Quarterly reports

In accordance with Angelo Bianca's letter of March 12, 2014 requiring Energy Answers to provide quarterly status reports on construction activities at the Fairfield Project to ensure

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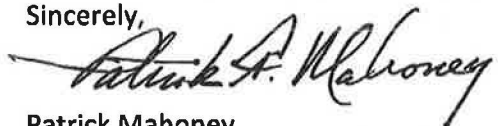
compliance with State and Federal regulations, we have since provided quarterly reports that included descriptions of the ongoing construction activity and also work scheduled to be undertaken in December 2015, most notably the "crushing" work described above. We also discussed the rationale behind the "crushing" work at our meeting at MDE on July 1, 2014, and its consistency with the overall resource recovery approach central to the project.

At that same meeting, we detailed the myriad design and construction considerations associated with the recovery and remediation of a contaminated brownfield site, specifically how site utility use and protection is a major consideration in environmentally sensitive construction work and how the material resulting from the "crushing" work will support those efforts.

Subsequent quarterly reports have also provided information regarding our application for the construction permit required for the "crushing" work, which has now been secured for the December 2015 work plan schedule.

Based on this information, it is clearly within the Department's discretion to allow Energy Answers to continue development and construction of the Fairfield Project. Either or both of the stop-work order and the on-site activities mean that the soonest that the 18-month window could close is next month. With crushing activities set to begin imminently as long as the Department agrees with that conclusion, the upcoming work will easily meet the Clean Air Act standard for work within the 18-month period. Accordingly, I would respectfully request that you allow this much-needed economic development project move forward in Baltimore. We request an early meeting to review your letter and this letter in detail. If you have any questions, please do not hesitate to contact me.

Sincerely,



Patrick Mahoney
President
Energy Answers Baltimore, LLC

cc: Todd Chason, Esquire
Roberta James, Assistant Attorney General
Angelo Bianca, ARMA Deputy Director
Andrew Dize
Councilman Edward Reisinger

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